

REPRESENTATION

Anent the Usefulness and Necessity of Commislar-Courts.



THe Usefulness and Necessity of Commislar-Courts, both for the Conveyance of Moveables, & Decision of Actions competent to these Judicatures, is so well known, that it were unnecessary, to Represent the Consequences, that might arise by the Suppression of these Courts: Yet in respect, that the Nature of the Judicature, the Methods of their Procedure, and Subject anent which they are Versant, are best known to Lawyers, and that the Abuses and Exactions of some Commisars within the Kingdom, may have created Prejudices in the minds of some of the Leidges, to whom the Rise and the Usefulness of these Courts are not known: Therefore, the Prejudices against them, may be thus obviated and removed.

As 1. These Courts have been considered by some, as a Consequence of Popery, or Episcopacy: And therefore, that they ought to be Abolished with Bishops.

2. That the Confirmation of Testaments, or other Processes competent to them, may be remitted to other Interior Courts, reserving such as are of the greatest Importance, to the Lords of Session.

It is answered, 1. That Commissariots had not the least dependance upon Episcopacy at their Ere&tion, for at the Reformation when Popery was abolished, all the Officials Offices which depended upon that Clergy, were also extinguished, & in place thereof the Commissariot of *Edinburgh* was then erected, with an immediate dependance upon the Crown, so that these Commisars had neither the title when Episcopacy prevailed, nor did any ways depend upon Bishops; and by their Ere&tion, there was little or nothing left to other Commisars through the Kingdom, either as to Jurisdiction or Emolument; and the Forms of the Judicature, as well as the Jurisdiction, and Execution of the Decrets thereof, were wholly altered from what was practized by the Officials, so that there remained nothing Ecclesiastick in the Judicature, but that the most favourable Cases were Remitted to it, which Piety and common Honesty required to be managed and dispatched with the greatest Care, Tenderness and Diligence.

The Commisars of *Edinburgh* continued to enjoy a general Jurisdiction over the Kingdom from their Ere&tion in anno 1560, till Episcopacy was Established in the year 1609; and the same Parliament 1592, which did fully establish Presbytery, did Ratifie the Commissariot of *Edinburgh*, as appears by the 25th Act of the printed Index of the unprinted Acts of that Parliament.

The Quots of Testaments were exacted and applyed to the Lords of Session, after the abolishing of Popery, till the year 1609: and by a Clause of the sixth Act of the Parliament holden that year, the Quots were appointed to be payed to the several Arch-Bishops and Bishops.

At the Establishment of Episcopacy the said year, Commissars were appointed to confirm all Testaments within their respective Diocies, and the Arch-Bishops and Bishops obtained the Quots thereof, as is fully exprest in the sixth *Act of Parliament*, 1609, but the Parliament had that regard to the privat Right of the Commissars of *Edinburgh*, then in Office, and even to their Successors, that no dismembration of the Jurisdiction of that Court could be obtained, till the Commissars of *Edinburgh*, their consent were first procured, and a reasonable Satisfaction made to them and their Successors; and to this end the Arch-Bishops and Bishops upon the one part, and the saids Commissars upon the other, entered into a Submission anent what satisfaction should be made to them, whereupon there followed a Decreet Arbitral upon the day of *June* 1609.

Thereafter the Commissars Offices were always during Life, and the Court was still a civil Judicature, without any other Dependance upon the Bishops, than that of Presentation, and the Right of Quots: And therefore, during the Suppression of Episcopacy, the Commissars did continue in the same Condition, only depending upon the Crown, and when Bishops were restored in the year 1662, though all other Deeds to their Prejudice, after the year 1637, were rescinded, yet the Rights of the several Commissars Offices, were expressly Ratified.

When Presbitry was last established in this Kingdom, there being then greater Exactions in these Courts, than at this time, there was a Design to have Supprest that Judicature, on the same Grounds formerly mentioned, but the Case being fully considered, it was found, that the Court had no Dependance upon Episcopacy and that the use thereof, was so universally Disseminat through our Law, that any Invasion upon the same, would in consequence, have overturned the most necessary Foundations thereof: And therefore, they did continue, during all the time of Presbitry.

2. The same Grounds that did formerly satisfy the Parliament, That the Commissariots could not be suppressed, by annexing of their Offices to Sheriffs or Lords of Session, must still satisfy.

For 1. It is to be considered, That the annexing their Offices to another Judicature, doth import, the necessity of the being of that Office: and seeing the Office must still continue, it is most just, that it do remain in the persons of those, who have fitted themselves for their Employments, and who have acquired these Offices, for most onerous Causes during life; So that albeit the publick Interest of the Nation, might preponder the Interest of a privat Party, so far as to suppress an unnecessary Office, yet the security of privat Right, doth require, that so much of that Office as doth remain, should pertain to these who are legally possess of it, rather then to be gratuitously given to others, who have no claim to it.

2. Sheriffships and Regalities, are oftentimes heretable; and such as are not so, are not supplied by persons chosen, upon any consideration of their fitness or capacity, in the Decision of Matters of Law, the Businesses that falls before them, being commonly possessory, or concerning the Peace of the Country, which are not of Intricacy; whereas the most nice, delicat and precise Debates in our Law, do arise upon these Subjects, which properly are reserved to the Commissariots, as the Conveyances of Moveables, in which a thousand delicat Debates do arise, which have never yet fallen under the Decision of any other Court; and the particular knowledge of this great Branch of our Law, is preserved by the practice of Commissariots, to which the Lords have no small regard; And are altogether unknown to other Inferior Judges within this Kingdom.

The Debates also arising anent Teinds, are subtle and various; as most of all the Cases that are particularly reserved to Commissariots, and could not be fully determined by any other Inferior Judicature; neither can these cases be properly decided by the Lords of Session, because of the multiplicity of Business depending before them, which would render Parties attendance most chargeable and expensive. Whereas, many Affairs concerning Orphants, Widows and poor people, cannot admit of delay, nor bear the necessary Expence of such Processes before the Lords; and therefore the Commissars do, and must proceed Session and Vacciace, as Affairs occur; and their Summons are peremptor without continuation: So that Parties have always their proper Judge at hand, which would all be contrary, if the Cognition of these Matters were taken to the Lords.

3. There is no Nation that wants a particular Judicature, for Consistorial matters: So that the ground of Clamour being only in relation to the abuses, and exorbitant exactions of some Commissars, the natural consequence is only to Regulate their Rates; for which effect, several Commissions have been granted, and the Commissars are fully satisfied, that there be an effectual course for Regulation, both of the Dues of Testaments, (which is special in their Courts) and of ordinar Actions, wherein their case is common with other Judicatures, and that in the saids Regulations, there be a due regard had both to the reasonable ease of the Leidges; and also that there be a competent Emolument left to the Possessors of these Offices, which may enable them to the diligent and faithful Exercise thereof, and may encourage others of good capacity to breed and fit themselves for the discharging of the same; For if some competent Emolument do not remain, it cannot be expected, that such as are most fit and proper for these Offices, will imploy their time unprofitably in them, whereby they will fall in the hands of Ignorant, Unskilful persons; which will be very prejudicial to many persons, whose affairs, most necessarily fall to be considered in these Courts, and that which was most Grievous and Burdensome to the Leiges, was,

1. The Quots of Testaments, which of all other Charges, was most unwillingly paid; And by the abolishing of Episcopacy, is now laid aside; And next, the summar Charges of Horning, formerly given to Confirm Testaments, which by the late Act of Parliament are discharged. So that a reasonable Regulation of the ordinary Dues, payable to the Commissars, will disburden the Leiges of all that was grievous in that Court, and set known bounds to any particular Commissars who have been used to exorbitant Exactions, who were most part these who were at greatest distance from the Seat of Justice, whereby the Leiges had neither Information of what might be justly exacted, nor could without great charge obtain Redress, which by some living in these Bounds, was looked upon as the practices of all the Commissars of the Kingdom;